No. 146

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1941

R. E. CRUMMER & COMPANY,

Petitioner,

vs.

E. H. WARE, ET AL., and
BARNETT BANK OF AVON PARK, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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[illegible], Jr.,
Counsel for Petitioner.

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TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May it please the Court, the Petitioner, R. E. Crummer & Company, respectfully shows unto this Court:

STATEMENT OF THE CASE

This is the second appearance of this case before the Court. In the first case, *American United Mutual Life Insurance Company vs. City of Avon Park*, 311 U. S. 140, 85 L. Ed. 93, an interlocutory decree confirming a Plan of Com-

position of the City of Avon Park, filed under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403) was reversed, and the cause remanded to the District Court for further proceedings. During the pendency of the proceedings in bankruptcy, and as a part of the Plan of Composition under which the Refunding Bonds were to be issued as extensions, mergers and renewals of the old indebtedness (R. 185), the City of Avon Park, pursuant to authority of the City Charter[1] and pursuant to orders of the Bankruptcy Court, made special levies for a sinking fund for the payment of the indebtedness, the evidence of which was to be transmutted by the Plan of Composition into new Refunding Bonds. The City Charter specifically prohibited these debt service funds from ever being diverted to any other purpose.[1] Part of the

[1] The Charter provision is as follows:

Chapter 12514. Laws of Florida, Special Acts, 1927.

Sec. 29. The City Council shall have power by ordinance to levy and collect taxes upon all property, real, personal and mixed within the corporate limits of said City, for municipal purposes. For ordinary purposes the rate shall not exceed twenty-five (25) mills on the dollar; a special tax in addition thereto may be levied sufficient to create a sinking fund for the purpose of paying off the city's bonded indebtedness and interest thereon; a special tax may be levied and collected not to exceed two (2) mills on the dollar for the support, maintenance or employment of a municipal band. A special tax may be levied and collected not to exceed two (2) mills on the dollar for publicity purposes. All of said special taxes herein enumerated to be in addition to the levy made for general municipal purposes, and the moneys arising from said levy shall not be diverted or used for any other purpose than that for which same is made. All levies shall be made from the approved permanent assessment roll prepared by the City Tax Assessor. All persons, corporations, or firms holding property, whether real or personal, shall be subject to taxation, by the City of Avon Park, and are hereby required to make a return of same for such purposes on a blank to be furnished by the City of Avon Park on or before the first day of February in each year. Such returns shall contain a complete list of all property, both real and personal, located in the City of Avon Park and subject to taxation by said City belonging to such person, firm or corporation, on the first day of January in the years for which return is made, giving separately and intelligently a description of each separate lot and parcel of real estate.

funds from these special levies (the sum of $37,766.33) was deposited from time to time with the Respondent, Barnett Bank of Avon Park in a "sinking fund" account. After the decision of this Court, the Respondents, Ware, et al., City Commissioners of Avon Park, consulted two attorneys (R. 90) as to the disposition of the debt service funds then on hand. Both attorneys advised the Respondents against using such funds in the construction of a then contemplated airport. On January 14, 1941, a check was presented to the Respondent, Barnett Bank of Avon Park, which was drawn on the "sinking fund" account, payable to the order of that bank. For this check, and simultaneous therewith, the Respondent Bank gave a draft for this total sum drawn on a Jacksonville, Florida bank. At the time of the withdrawal of these funds, the bank had been advised that the City intended to use the funds on an airport, and also knew, through hearsay, that the City was proceeding under the provisions of the Municipal Bankruptcy Act (R. 142). These funds, together with other funds, were spent on the construction of an airport in the City of Avon Park.

In March, 1941, the District Judge called all parties to the bankruptcy proceeding before it to determine the future progress of the case (R. 1), and also to determine the amount of debt service funds collected during the bankruptcy proceedings then on hand. It was then made to appear that Ware, et al., the City Commissioners, had taken this money levied under the court order (the $36,270.40 of the debt service funds which were on deposit with the Barnett Bank), and an additional sum of $29,447.80 (total $65,715.20) and had spent it in the construction of the airport in the City. There was in addition a diversion during the pendency of the bankruptcy proceeding of approximately $11,000. by the

previous City Commissioners (who are not involved in these proceedings). Thereupon, the District Judge issued an order against Ware, et al. (R. 104-110), the City Commissioners, together with the Respondent, Barnett Bank of Avon Park, to show cause why they should not be compelled to replace and account to the debt service account of the City the amount of such funds diverted by them. There were other persons named in the order who are not involved in this proceeding. The Court, in its order to show cause, stated that the diversion

> "was probably the result of a conspiracy between certain officials of the City of Avon Park, the contractor, the surety on the contractor's bond, and the banks in which the moneys involved were originally deposited, and to which the same were transferred, or their respective officials." (R. 105.)

The order further stated that the moneys diverted were

> "assets and resources of the bankrupt municipality which had come within the jurisdiction of this Court, and which were in *custodia legis*, and that this Court has power and authority and is under a duty to require the replacement of such funds." (R. 105.)

The Respondents, Ware, et al., City Commissioners of Avon Park, answered the rule to show cause, admitted the diversion of the funds, but denied that the Court had any jurisdiction over them, denying that the funds were in *custodia legis* (R. 110). The Respondent, Barnett Bank, answered the rule to show cause (R. 118-122), denied that the funds were in *custodia legis*, denied that it conspired with the City Commissioners to divert the funds, claimed that it had paid the funds back to its depositor, and therefore was not accountable for any subsequent diversion by its officials.

Testimony was taken, and the case was heard on its merits. After a full hearing and the taking of testimony, the District Judge rendered an opinion, in which he determined that (R. 225-230)

> "* * * *such fund was under the control of the Court and raised pursuant to an order of the Court,* and it appears to me that the City officials were in the same position as the officials of a corporation in organization proceedings under 77-B who were permitted to carry on the business of the corporation, and undoubtedly could be held responsible for the diversion of funds without the authority of the Court."

and that

> "it is contended by these respondents that they can only be held responsible in a plenary suit. It has always been held that the Court by summary proceedings can require officers and others who dissipate a fund in custodia legis to reimburse such fund, and I can see no valid reason why such rule should not be applied to the facts in this case. The fund was under the control of the Court, and the cause was still pending in this Court, and these officials deliberately and wilfully against the advice of counsel diverted the fund, and they must be held responsible therefor."

The Judge further found that the Respondent, Barnett Bank, having paid the debt service fund on deposit back to its depositor, should not be held accountable for its subsequent diversion. Then on the basis of such finding by the District Judge, an order was issued (R. 230-231) dismissing the Respondent bank, but requiring the Respondents, Ware, et al., to pay into the sinking fund account of the City of Avon Park the sum of $65,715.20. From this order, the Respondents, Ware, et al. (styling themselves "individually and as com-

misioners of the debtor corporation") (R. 231) appealed to the United States Circuit Court of Appeals.

The Petitioner, R. E. Crummer & Company, a creditor of the City, and a representative of other creditors, also appealed from that part of the order releasing the Respondent, Barnett Bank, from replacing the debt service funds withdrawn from it, claiming that if the funds were in *custodia legis* that the bank knew of the bankruptcy proceeding, and knew of the intended diversion at the time of their withdrawal, and therefore it should be made to account for them.

The Circuit Court of Appeals for the Fifth Circuit reversed the District Judge, determined that the debt service funds were not in *custodia legis* during the pendency of the bankruptcy proceeding, that the order sought to compel the officials to account for the management of the fiscal affairs of the City, and that the Court had no jurisdiction by summary proceedings to compel the Respondents, Ware, et al., or the Bank, to account for the funds. It is from this decision of the Circuit Court of Appeals that the writ of certiorari is now being presented.

QUESTIONS PRESENTED

1. Does a Court of Bankruptcy, proceeding under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403) have jurisdiction over funds levied and collected, pursuant to an order of the Bankruptcy Court, by a petitioning municipal corporation (solely for the purpose of paying the bonded indebtedness of the City affected by the Plan) so that it can compel, by summary proceeding, the replacement of such funds if they have been illegally diverted by the City officials of the petitioning City?

2. Are debt service funds, levied and collected by a municipality proceeding under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403), pursuant to an order of the Bankruptcy Court and on deposit in a bank during the pendency of the proceedings, in *custodia legis?*

3. Where, in a proceeding under Chapter IX of the Bankruptcy Act, debt service funds are collected under a court order to pay the bonded indebtedness of the City affected by a Plan of Composition, and the interlocutory decree confirming such Plan has been disapproved by the Supreme Court of the United States, but while the bankruptcy proceedings are still pending, the officials of the City withdraw such funds from a bank with knowledge on the part of the bank of the intended use of the funds, does the Bankruptcy Court have jurisdiction of such funds to determine whether such diversion was illegal, and if such diversion was illegal, does it have jurisdiction to compel the City officials and the bank to replace such funds by a summary order?

4. Where it appears that during a proceeding under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403) funds levied and collected pursuant to a court order have been diverted to purposes other than those for which they were levied, must creditors of the City resort to a plenary suit against a bank and the City Officials to compel a repayment of such funds if such funds were illegally diverted to purposes other than those for which they were levied?

REASONS FOR GRANTING CERTIORARI

1. The Circuit Court of Appeals for the Fifth Circuit has decided an important question involving the jurisdiction and powers of a bankruptcy court proceeding under the Munici-

pal Bankruptcy Act (11 U. S. C. A. 401-403) which has not been, but should be, settled by a decision of this Court.

2. The decision of the Circuit Court of Appeals for the Fifth Circuit has decided a question of federal law in a way probably in conflict with applicable decisions of this Court.

American United Mutual Life Insurance Co. vs. City of Avon Park, 311 U. S. 138, 85 L. Ed. 91,

Gross vs. Irving Trust Company, 289 U. S. 342, 77 L. Ed. 1243,

Chicago, Illinois National Bank & Trust Co. vs. C. R. I. & P. R. R. Co., 294 U. S. 648, 79 L. Ed. 1110,

Sampsell vs. Imperial Paper & Color Corporation, 313 U. S. 215, 85 L. Ed. 1293,

Isaacs, Trustee in Bankruptcy, vs. Hobbs Tie & Timber Co., 282 U. S. 739, 51 Sup. Ct. 270, 75 L. Ed. 645,

Pepper vs. Litton, 84 L. Ed. 281, 308 U. S. 295,

May vs. Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870.

3. The Circuit Court of Appeals has decided an important question of federal law probably in conflict with decisions of other Circuits.

Poinsett Lumber & Manufacturing Company vs. Drainage District No. 7, (1941) 119 F. (2) 270,

Governor Clinton vs. Knott, 120 F. (2) 149, (C. C. A. 2)

Rabinovitz vs. Oughton, (C. C. A. 3) 92 F. (2) 297,

Reifsnyder vs. B. Levy & Son, (C. C. A. 3) 88 F. (2) 287.

4. The Circuit Court of Appeals has decided a question of federal law in a way probably contrary to the law, as announced by the decisions of the State of Florida rendered prior thereto.

Kelley vs. Lassiter, 7 So. (2) 458, (Adv. Sheets).

5. The decision of the Circuit Court of Appeals is probably in conflict with prior decisions of the same Circuit.

Touchton vs. City of Fort Pierce, 109 F. (2) 691.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case, numbered and entitled on its docket: No. 10195, E. H. Ware, et al., Appellants, vs. R. E. Crummer & Company, et al., Appellees, and R. E. Crummer & Company, Appellant, vs. Barnett Bank of Avon Park, et al., Appellees, and that said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and that Petitioner may have such other and further relief as to this Court may seem meet and just.

ROBERT J. PLEUS,

JOSEPH P. LEA, JR.,

First National Bank Building,
Orlando, Florida,

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. The Opinion.

The opinion of the Circuit Court of Appeals, rendered on May 5, 1942, appears on pages 245-253 of the record.

2. Statement of Grounds of Jurisdiction.

The City of Avon Park, Florida is now proceeding under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403). An interlocutory decree confirming the Plan of Composition was reversed by this Court, and the cause was remanded for further proceeding. Debt service moneys, collected during the time this Plan was in operation, under orders of the Court, were spent by the City officials on an airport being constructed in said City. The Circuit Court of Appeals determined that such funds were not in *custodia legis*, and that an order requiring their replacement would interfere with the fiscal affairs of the City. This petition for writ of certiorari to review the decision of the Court is filed pursuant to Section 240 of the Judicial Code, as amended, 28 U. S. C. A. 347.

3. Statement of the Case.

A complete statement of the case, insofar as the facts are material to the consideration of this petition, has been given in the petition for the writ of certiorari, and for the sake of brevity is omitted here.

4. Specifications of Errors Intended to be Urged.

The errors considered to have been committed by the Fifth Circuit Court of Appeals in its decision, which are urged as a basis for consideration of this petition, are:

1. The Court erred in determining that in a proceeding under the Municipal Bankruptcy Act (11 U. S. C. A. 401-403) debt service funds collected pursuant to the Plan, under an order of the Bankruptcy Court, are not in *custodia legis*, and therefore the Bankruptcy Court is powerless to compel the replacement of such funds by any person who may have illegally diverted them from the City.

2. The Court erred in determining that under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403) the Bankruptcy Court has no jurisdiction over funds levied and collected under an order of the Court during the bankruptcy proceedings, notwithstanding the fact that the Plan has been disapproved, but the proceedings have not been dismissed.

3. The Court erred in holding that under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403) a summary order of the Court requiring the replacement of debt service funds levied and collected under an order of the Court during the pendency of the Bankruptcy proceedings and diverted by the officials would interfere with the fiscal management of the City.

4. The Court erred in holding that in a proceeding under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403) debt service funds levied and collected during the pendency of the proceedings, and on deposit with the bank, were not in *custodia legis*, and therefore the Court had no jurisdiction to determine in a summary proceeding whether or not the bank should be made to replace such funds, if they have been illegally withdrawn from the depositing bank.

ARGUMENT

Point 1.

The Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by a decision of this Court.

The decision of the Circuit Court of Appeals determines for the first time in a municipal composition proceeding (11 U. S. C. A. 401-403) that funds levied and collected under an order of the Bankruptcy Court to pay the debts of the City are not in *custodia legis*, and that the Bankruptcy Court is powerless to control such funds. It determines further that such an order would interfere with the fiscal affairs and governmental functions of the petitioning City. Quite obviously a plenary suit would no more interfere with the fiscal affairs of the City to compel the restitution of the funds (if such funds were illegally diverted) than a summary proceeding in the bankruptcy court. This is particularly true in the instant case where testimony was taken, pleadings filed, and full hearing accorded all persons. Chapter IX of the Bankruptcy Act (11 U. S. C. A. 401-403) has now become an important and integral part of the Bankruptcy Act of this country. This is demonstrated by the fact that at the time of the preparation of this petition for certiorari the extension of the Act has been recommended for an additional four years, and such extension has been approved by the House of Representatives of the United States, by unanimous consent, and in all probability by the time this petition reaches the Supreme Court its extension will become law. This extension for an additional period of time is clearly indicative of the importance of the Act as a remedial measure, not only to the many financially embarrassed municipalities in the United States, but

also to creditors of such municipalities who must join with the municipalities in seeking relief under the Act. Therefore, a clarifying decision on this particular phase of the Act certainly is due the municipalities, as well as creditors who relinquish contract rights when proceeding under the Act. In view of this fact, the Supreme Court of the United States should set at rest and definitely determine any question as to the power of a Bankruptcy Court proceeding under the provisions of the Act to control the funds levied and collected pursuant to orders of the Bankruptcy Court. As a matter of practical operation, creditors who participated in the Plan are held at bay during a long period of time while the City is able to collect debt service funds for those creditors. Yet if this decision is correct, the City officials are free, during the pendency of the very proceedings, to take moneys collected under the orders of the Bankruptcy Court and use them in any manner, regardless of whether legal or illegal, and be in no way accountable to the federal court for their disposition. Obviously, if a plenary suit would lie, such plenary suit would no more control the official acts of the City than proceedings under the Bankruptcy Act. Creditors who rely for the protection of their rights, while proceeding under the provisions of the Municipal Bankruptcy Act, should have some assurance that their rights will be protected during the proceedings. If the decision is correct, it means they have no such remedy in a court which has jurisdiction over them and of the subject matter.

Point 2.

The decision is probably in conflict with applicable decisions of this Court.

Unfortunately, there is only one decision of this Court involving the application of the Municipal Bankruptcy Act, and it is interesting to note that that case involved this very

same City of Avon Park, Florida. In that case, *American United Mutual Life Insurance Company vs. City of Avon Park,* 311 U. S. 138, 85 L. Ed. 91, this Court clearly pointed out that the Bankruptcy Court was a court of equity, and that it was "guided by equity doctrines and principles, except insofar as they are inconsistent with the Act." It would appear to be inequitable for a municipality to petition the Court to confirm a Plan of Composition, raise money pursuant to such Plan under orders of the Court, which moneys obviously can be paid only to its creditors, and then allow its Commissioners to divert such moneys from the purposes for which they were levied. It should be observed that the proceeding in the District Court was not against the City of Avon Park itself, it was against officials in favor of the City, and of course against the bank in favor of the City. The mere fact that the procedure for carrying out of the Plan of Composition had been disapproved (as it was in this case), although the bankruptcy proceeding has not been dismissed, does not thereby oust the court from jurisdiction over the funds which it had ordered to be raised in the first instance. By analogy, funds of a municipal petioning debtor, raised pursuant to an order of the Bankruptcy Court, are in *custodia legis* to the same extent and with like force as funds of a corporate entity proceeding under provisions of Section 77-B. It is submitted that the Bankruptcy Court has jurisdiction over such funds until the proceedings are dismissed by some lawful order, and that until such proceedings are dismissed it has jurisdiction to determine whether or not such funds have been illegally taken from its custody and control, and if such determination is correct, it has power by summary proceedings to compel persons who have taken such funds without lawful authority to repay them to the petitioning City. Quite obviously, in the instant case, the City Commissioners control the City, and the Court should therefore, as a court of equity, determine what is the legal and

proper thing to do, insofar as the City is concerned. This Court, in an analogous case under corporate proceedings, has determined that the Bankruptcy Court has exclusive jurisdiction over the corporate entity proceedings under the provisions of the Act.

In *Gross vs. Irving Trust Company*, 289 U. S. 342, 77 L. Ed. 1243, it was determined that the Bankruptcy Court, once a petition has been filed, has exclusive jurisdiction over the estate of the bankrupt. Quite obviously, in a municipal bankruptcy proceeding, the Court must have exclusive jurisdiction over debt service funds of the City, and that such jurisdiction continues until the proceedings have been dismissed.

In *Chicago, Illinois National Bank & Trust Co. vs. C. R. I. & P. R. R. Co.*, 294 U. S. 648, 79 L. Ed. 1110, this Court held that a court of bankruptcy is vested with such authority as is necessary to enforce the provisions of the Act. Using the same analogy to the instant case, if creditors who have been held at bay by the bankruptcy proceedings, and have come under the protective cloak of the court during the bankruptcy proceedings, have no remedy against persons who have taken funds from the bankrupt, then proceedings under the Municipal Bankruptcy Act, so far as creditors are concerned, would be to their great disadvantage, since the Court has no power to correct a situation which has resulted in great damage to such creditors.

As to other powers of the Bankruptcy Court, the cases of *Sampsell vs. Imperial Paper & Color Corporation*, 313 U. S. 215, 85 L. Ed. 1293, and *Isaacs, Trustee in Bankruptcy, vs. Hobbs Tie & Timber Co.*, 282 U. S. 739, 51 Sup. Ct. 270, 75 L. Ed. 645, appear to be in point; see also *May vs. Henderson*, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870.

Point 3.

The decision is probably in conflict with decisions of other Circuits.

The United States Circuit Court of Appeals for the Eighth Circuit, in the case of *Poinsett Lumber & Manufacturing Company vs. Drainage District No. 7*, (1941) 119 F. (2) 270, had before it in a Municipal Composition Proceeding a question of the jurisdiction of the Bankruptcy Court. The Court, in that case, specifically determined that:

> "Upon the approval of the debtor's petition as properly filed the resources of the debtor came within the exclusive jurisdiction of the bankruptcy court. Isaacs, Trustee in Bankruptcy, vs. Hobbs Tie & Timber Co., 282 U. S. 739, 51 Sup. Ct. 270, 75 L. Ed. 645; Steelman, Trustee in Bankruptcy, vs. All Continent Corporation, 301 U. S. 278, 57 Sup. Ct. 705, 81 L. Ed. 1085."

That case held that the Court has jurisdiction over the resources to the extent that it can restrain persons from suing the petitioning debtor in a state court. The Circuit Court of Appeals of the Fifth Circuit, in the instant case, has determined that the Bankruptcy Court has no jurisdiction over these resources of the debtor, and that the extent of jurisdiction is merely to approve or disapprove the Plan of Composition.

A proceeding similar to the one at hand arose in a proceeding under 77-B, in the case of *Governor Clinton vs. Knott*, 120 F. (2) 149, (C. C. A. 2) where the President, Treasurer and Attorney of a corporation, during the pendency of the bankruptcy proceeding, took certain moneys belonging to the corporation. When this fact became known, the Court issued a summary order against the persons, individually, requiring them to show cause why the funds should not be replaced on

the ground of a "fraud perpetrated upon the Court." Objection was made that plenary proceedings should be used rather than summary proceedings, because the moneys were out of the possession of the Court. The Court, in that case, pointed out that summary jurisdiction may be invoked other than to protect property within the actual constructive possession of the Court, the Court saying:

> "Here a contract was made with the debtor in possession and a fraud worked on its estate through a common conspiracy among the respondents. This amounts to a fraud and an imposition upon the court itself, and in such cases the court undoubtedly has summary jurisdiction to protect itself in the interest of persons and property within its custody."

This language is quite similar to that used by the District Judge in the instant case. As to the illegal diversion of the funds, the Court said (R. 228):

> "It is admitted in the answer and otherwise conclusively shown by the evidence that these respondents were the members of the City Council of Avon Park for the period beginning October 1, 1939, and ending after the issuance of the rule to show cause, and it conclusively appears by the admissions in the answer of these respondents and from the proof that, while the bankruptcy cause was pending, these respondents deliberately and willfully, after having been advised to the contrary by eminent counsel, diverted from the interest and sinking fund levied pursuant to the plan placed temporarily in effect by the interlocutory decree of the Court the sum of $65,715.20, and expended the greater part of such sum sponsoring a W. P. A. project for the improvement of an airport to be leased to a private citizen for the conduct of a flying school. As has been before said, these respondents admit such diversion, and contend:

"First, that the diversion was lawful, and as to this contention I must hold against these respondents.
"Second, that the fund was not in the custody of the Court, and therefore the Court can make no order for its replacement. While strictly speaking, the fund may not have been in the actual custody of the Court, *such fund was under the control of the Court and raised pursuant to an order of the Court,* and it appears to me that the City officials were in the same position as the officials of a corporation in organization proceedings under 77-B who were permitted to carry on the business of the corporation, and undoubtedly could be held responsible for the diversion of funds without the authority of the Court.
"Third, it is contended by these respondents that it appearing that the fund has already been diverted and expended, the Court is without power to require these respondents to reimburse the interest and sinking fund for the sum so diverted. It does not appear that any of these respondents is insolvent or that it is beyond their power to make such restitution, and such contention must be overruled."

The fact, as determined by the District Court, that the diversion was illegal and was the result of a probable conspiracy between the Respondents, Ware, et al. (but not the Respondent Bank) and other persons not involved in this case, is certainly a matter that a Bankruptcy Court proceeding under the provisions of the Bankruptcy Act, or as a court of equity, which has jurisdiction of the *res* and the parties, if nothing more, should have power to remedy; otherwise, a Court of Bankruptcy, proceeding under the Municipal Bankruptcy Act, is powerless to conserve the *res* during the pendency of the proceedings, although it has jurisdiction of the *res,* of the creditors, and of the City. Such an order protecting the funds would in no manner interfere with the governmental powers of the City. The order is not even against the City, but is against third parties in favor of the City. This is particularly

true where the funds have been taken from the use for which they were levied under orders of the Court by persons occupying a fiduciary relationship, with the petitioning taxing unit, as well as the creditors who joined with the taxing unit in proceeding before the Court.

In the case of *Rabinovitz vs. Oughton*, 92 F. (2) 297, (C. C. A. 3) a summary order was issued against the President of a bankrupt corporation compelling him to show cause why he should not replace funds illegally taken from the corporation. The Court, in that case, very pertinently pointed out that the President and Secretary of the corporation were the "mind, hands and pockets" of the bankrupt, and "will be treated in the bankruptcy court as if they were the bankrupt and amenable to its jurisdiction", and that they, as officers of the bankrupt company, were in duty bound to safeguard the assets of the company, and to "execute the responsible duties entrusted to their management with absolute fidelity to both creditors and stockholders." It would appear that the Respondents, Ware, et al., as Commissioners of the City of Avon Park, would likewise occupy a responsible position of fidelity to both the City and to the creditors of the City who have joined with the City in submitting themselves to the jurisdiction of the Bankruptcy Court to confirm a method of re-adjusting the indebtedness of the City; that when these Respondents assumed an adverse position in attempting to divert moneys levied and collected during the pendency of the proceedings under an order of the Court, without any authority from the Bankruptcy Court for such diversion, the Bankruptcy Court can act for the City and compel such persons to replace the funds. In like manner it would appear that the Bankruptcy Court, if the funds are in *custodia legis*, has jurisdiction to determine whether or not the Respondent Bank has fulfilled its legal duty in allowing the withdrawal of the debt

service funds on deposit with it during the pendency of the bankruptcy proceedings, and that if this legal duty has not been fulfilled, it could compel the bank to then fulfill its legal duty by paying the funds to the person rightfully entitled to them.

In *Reifsnyder vs. B. Levy & Son,* (C. C. A. 3) 88 F. (2) 287, the officers of a corporation proceeding in bankruptcy paid to themselves a large sum of money on deposit with the bank at the time of the filing of the bankruptcy proceedings. Thereupon, a summary order was issued against the officers, requiring them to show cause why the moneys should not be paid over to the trustee in bankruptcy. Again, the Court in this case pointed out that the corporate officers are duty bound to safeguard the estate of the company, and in due course turn it over to the Court.

By the same token, the Respondents, Ware, et al., City Commissioners of the City of Avon Park, and the Respondent, Barnett Bank, were duty bound to account to the City (the proper party) for any diversion of funds which came into being during the pendency of the bankruptcy proceedings under the orders of the court. Of course, it is recognized that in a municipal bankruptcy proceeding, the bankruptcy of a public entity is different from that of a private concern, and its assets cannot be disposed of as in ordinary bankruptcy proceedings. *Newhouse vs. Cochrane Irrigation District,* (C. C. A. 9) 114 F. (2) 690. However, it is contended that the Court does have jurisdiction over the funds which came into being as a part of the plan so that it can protect such funds from dissipation by parties who may have taken them from their intended use in an illegal manner.

Point 4.

The decision of the Circuit Court of Appeals is contrary to the law of the State of Florida, as announced by decisions rendered prior thereto.

The Supreme Court of the State of Florida, just prior to the rendition of the decision by the United States Circuit Court of Appeals, had a question before it of somewhat similar nature. In that case, *Kelley vs. Lassiter*, 7 So. (2) 458 (Adv. Sheets), moneys were on hand pursuant to a decree of the State Court rendered prior to the filing of a petition in bankruptcy by the Everglades Drainage District, the largest Drainage District in the State of Florida. It was contended by the appellants that the bankruptcy court had no jurisdiction over those funds, and that they should be paid over to them. The lower court ruled adversely to their contention, and on appeal to the Supreme Court of Florida, that Court pointed out that upon the filing of the bankruptcy proceedings the funds of the bankrupt became within the exclusive jurisdiction of the Bankruptcy Court, the Court saying:

> "The Federal Constitution empowers Congress to enact bankruptcy laws and when enacted they become paramount laws on the subject. When such laws are enacted, it necessarily follows that the jurisdiction of the Federal Courts in matters of bankruptcy become dominant. If there are funds in the hands of the bankrupt when Federal Court takes jurisdiction, they also pass into the hands of that court as equity and good conscience may dictate."

Thus, the Supreme Court of Florida determined that debt service funds of a municipal corporation, proceeding under the provisions of the Municipal Bankruptcy Act, are under the exclusive control of the Bankruptcy Court. The Circuit Court of Appeals, in the instant case, determined that the Bankruptcy

Court has no jurisdiction over these funds. This Court should render an opinion clarifying the powers of the Bankruptcy Court under the Act.

Point 5

The decision of the Circuit Court of Appeals is probably in conflict with prior decisions of the same Circuit.

The Circuit Court of Appeals for the Fifth Circuit had before it the case of *Touchton vs. City of Fort Pierce*, 109 F. (2) 691, in which the question of whether or not a Bankruptcy Court, acting under the provisions of the Municipal Bankruptcy Act, had jurisdiction over the funds on hand with the debtor at the time of the filing of the petition so that such court could restrain a creditor from proceeding in the State Court to sequester such funds by a mandamus. It is submitted that that case determined that the Bankruptcy Court had jurisdiction over such funds, but in the instant case it determines that the Court had no jurisdiction over the funds.

Respectfully submitted,

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